CONSECINŢE ALE INSTABILITĂŢII CADRULUI LEGISLATIV PRIVIND FUNCŢIA PUBLICĂ ASUPRA CAPACITĂŢII ADMINISTRATIVE

Mihaela ONOFREI
Sandra GRADINARU

Mihaela ONOFREI
Phd., Faculty of Economics and Affairs Administration,"Alexandru Ioan Cuza" University of Iaşi
E-mail: onofrei@uaic.ro

Sandra GRĂDINARU
Teaching Assistant,Faculty of Economics and Affairs Administration,"Alexandru Ioan Cuza" University of Iaşi
E-mail: sandra.gradinaru@yahoo.com

CONSEQUENCES OF THE INSTABILITY OF THE LEGAL FRAMEWORK REGARDING PUBLIC SERVANTS ON THE ADMINISTRATIVE CAPACITY

Abstract
This paper proposes a careful analysis of current changes occurring in the field of legislation concerning public office. Analyzing the provisions of the Government's Emergency Ordinance no. 37/2009 and also of the Government's Emergency Ordinance no. 105/2009, both of them modifying the Law no.188/1999 regarding the public servants statute, we observed that an obvious politically direction of decentralized public institutions has been promoted. By declaring these acts unconstitutional, the category of coordinator directors was eliminated, currently being applied the settlements of Law no.188/1999. In this legal framework, has been proposed a new law amending the regulations on the Status of civil servants. However, these successive changes may only have a negative impact on public administrative reform and the incentive of the activity of civil services is far from being reached.

Keywords: public servant, decentralization, public institution, unconstitutionality

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Rezumat
Lucrarea de față propune o analiză detaliată a actualelor schimbări produse în domeniul legislației privind funcția publică. Atât O.U.G nr. 37/2009, dar și O.U.G. nr. 105/2009, ordonanțe de urgență ale Guvernului ce modificau Legea nr. 188/1999 privind Statutul funcționarului public, promovau o vădită tendință de politizarea a instituțiilor publice deconcentrate. Odată cu declararea neconstituționalității acestor acte normative, a fost eliminată categoria directorilor-coordonatori, în prezent fiind aplicabile dispozițiile Lg. 188/1999. În acest cadru legal, s-a propus o nouă lege de modificare a reglementărilor vizând statutul funcționarilor publici. Desi Legea de modificare ce a făcut obiectul controlului de constituționalitate nu a fost aprobată, toate aceste modificări succesive nu pot avea decât implicații negative asupra reformei administrative, eficientizarea activității serviciilor publice fiind departe de a fi atinsă.

Cuvinte cheie: funcționar public, descentralizare, instituții publice, neconstituționalitate.

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1. INTRODUCTION

The political changes in Romania, as well as the economic difficulties lately had as result severe constraints on the entire public sector and, last but not least, on the entire central administrative system.

From this perspective, the creation of a modern and efficient system with regards to public administration continues to represent a priority for the Romanian Government. Despite the fact that at this moment there aren't enough resources necessary for the creation of an appropriate legal and institutional framework, especially for implementing efficiently the reform measures, social and economic reasons determine a striking necessity to reform all fields of activity, especially the public function field. Under the

condition that the interests of the local, regional and national communities are represented and administrated by public servants, it it's high time we implement a stable legal framework which could provide all constitutional warranties.

2. THE LEGAL FRAMEWORK IN THE FIELD OF PUBLIC FUNCTION. THE EVOLUTION OF THE REGULATION

By regulating the organizing and functioning of the local public administration, Law no. 215/2001 is the legal framework for the public administration in the administrative-territorial units, which is based on the principle of decentralization, local autonomy and deconcentration of public services. Moreover, the process of transforming public administration in an administration in which public function and public servant stand front was performed step-by-step, mainly by including legal norms which act as outlines in the Constitution, and by elaborating usual norms in this field (Tatut and Paune 2007).

The status of public servants regulated by Law 188/1999 establishes the general arrangement for juridical relations between the public servants and the State or the local public administration, by means of local authorities. Thus, this law regulates the acceding conditions in this professional category, the duties and the way of performing this function, the rights and obligations of the above

mentioned category, as well as the way of transforming and ending the work relations in case of public servants.

Under the conditions of the necessity to adapt to the society's needs and to the requests of the European framework in this matter, the Status of public servants suffers and suffered a lot of changes throughout time. Moreover, we try to perfect and unite the legal framework in the field of public function,

by means of numerous norms. In this respect, Law 161/2003 is relevant, with regards to measures taken for ensuring transparency in exerting public dignities, public functions and in the affairs environment, preventing and sanctioning the corruption, HG 611/2008 for approving norms regarding the organization and development of the careers of public servants, HG 1344/2007 regarding the organization and functioning norms in case of the Disciplinary Commission.

On the basis of creating a public servant with no political involvement, professional, performance-oriented and having in view the separation of political functions from administrative functions and making responsibilities better, there was drawn the conclusion that a reform is needed in public administration, by means of which the Government is offered the possibility to control the local government.

3. APPLYING THE PRINCIPLE OF DECENTRALIZATION : ASPECTS OF UNCONSTITUTIONALITY

Established at the level of constitutional principle, the decentralization represents one of the aims rendered in the Government program for the years 2009-2012, with regards to the public administration reformation, with the purpose of continuing the reformation in the public administration on the basis of local communities autonomy, by means of decisional autonomy and also by means of patrimonial and financial autonomy, at the same time performing the total decentralization process (the Government Program 2009-2012, Chapter 22. Public administration reform).

The acceleration of the decentralization process is one of the main reformation strategies in public administration. In this context, the process of decentralization, meaning the transfer of authority and administrative and financial responsibility from central to local levels, is not an aim itself, but a way by means of which the decision-taking level is getting closer to that which will bear the consequences of the decision.

Due to the fact that the public administration reform is an important point in taking measures so as to establish the social and economic situation, we note that the actual changes in this field cannot but block all this process, reducing it at the level of political acting.

Both OUG no. 37/2009 and OUG 105/2009 have in view that the provisions in Law 188/1999 regarding the status of public servant, including those with respect to recruiting and occupying public functions aren't applied to the executives in decentralized public services, because these persons don't have the quality of public servants anymore.

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Under the pretext of making better and completing the institutional and normative framework and in order to make more efficient the public administration activity, including through the aspects with regards to decentralizing public administration in case of decentralized public services1, two Laws entered into force : the Government Order 37/2009, which modified Law 188/1999 with regards to the Status of public servants, entering into force on 06/10/2009, and declared unconstitutional on 07/10/1999, as well as OUG 105/2009, published in Monitorul Oficial no. 668, 6th October 2009, which approved OUG 37/2009 by means of art. 14, par. (1). We note that the latter norm was declared in its turn unconstitutional by means of Decision 1629/2009 with regards to admitting the unconstitutionality exception of provisions art. 1, par 1-5 and 26, art. 3, art. 4, art 5, art 8 and addendum 1 from the Emergency Ordinance 105/2009.

Relating to both regulations, we note that these merely lead to the politicization of the controlling institutions, as noted also by the Constitutional Court, without providing the results anticipated initially2.

Interpreting the mentioned provisions by means of Law 188/1999, we note that the Government established a mass dismissal in case of decentralized institutions, without relying on any of the reasons applicable to the dismissal of public servants. In this respect, the mentioned public servants didn't commit any misconduct and they do not fall under any provision in Law 188/1999, which provides the lawful termination of the Contract. Moreover, the activity of the chiefs of these institutions wasn't subjected to any control by means of superior institutions, which leads to the conclusion that this dismissal wasn't performed objectively. Thus, the question is if the purpose of these norms isn't that of making better the public administration's activity, since it is undoubtedly able to stop the administrative reform, by making it political and subjective.

We also take into account the fact that according to Law 188/1999 (2), the executives of decentralized institutions were nominated by means of examinations, on the basis of their competences and experience, whilst the provisions of the OUG 37/2009 found in OUG 105/2009 don't take into account the competences as main criterion in nomination or dismissal, the public servants being nominated according to competences and knowledge on the basis of a management project, which is in fact a formal way of nomination. The recruitment procedure in case of the new executives for the decentralized public institutions was performed on political grounds (Manda, 2007). After vacating jobs, as per art. 3, par. 4 from OUG 37/2009 and art 4 from OUG 105/2009, the persons that will occupy

[1] Reasons Exposed, the Draft Law for the Approval of the Government Emergency Ordinance no. 37/2009
[2] The Economic and Social Council, Points of View regarding the Project of Emergency Ordinance, With Reference to Some Measures For Bettering the Activity of Public Administration, www.cdep.ro

executive functions in the decentralized public services field are named by means of administrative act by the chief, under whose coordination and authority the public decentralized service works.

In this context, the Constitutional Court made a decision by rule 1629/3.12.2009, which suspended until 27th Feb 2010 OUG 105/2009, ceasing to effect since 28th Feb 2010. Bearing in mind the above-mentioned, starting this moment the provisions of Law 188/1999 will apply, with the same content prior to the unconstitutional changes which were performed by OUG 37/2009, and by art. 1, par.1-5 and 26, art 3, art 4, art 5, art 8, and addendum 1 OUG 105-2009.

Thus, at present time, executive functions in the decentralized public institutions are governed by the depositions of the Status of public servants, as direct consequence of losing the constitutional legitimacy of both ordinances mentioned. This sanction is different and more serious than the simple approval of a normative text.

4. THE PROPOSED MODIFICATION OF LAW 188/1999 INITIATED BY THE GOVERNMENT AND THE EFFECTS ON THE ADMINISTRATIVE CAPACITY

As a consequence of considering these normative acts as unconstitutional, bearing in mind the entry into force of the Framework Law 330/2009 regarding the unitary payment, and of the Law 329/2009 regarding the reorganization of authorities and public institutions, the administration of public expenses, the support of the affairs environment and respecting the framework agreements with the European Commission and the International Monetary Funds, the Government proposed the modification of the Status of public servants.

As per the new norms, the Public Servants National Association took charge in the attributions of the National Administration Institute, and in those of the regional continuous formation centres for the public local administration, centres which were dissolved, all these successive events leading to the modification and supplementation of Law 188/1999. In this respect, due to the continuation of the decentralizing of management skills for public functions and for public servants, by means of the draft law regulating the taking over by public authorities and institutions of power belonging to the Agency currently, regarding the elaboration and approval of the plan for occupying public functions, the organization and performing the recruitment contests and the promotion in a certain public function, as well as the reduction of notifications and the simplification of administrative procedures. At the same time, as per the project initiated by the Government, the chiefs of the decentralized services return to the status of public servants and can temporarily serve this function according to a notice written by the

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National Ag. Of Public Servants, if they have 5 years of activity in administration and have a degree in the field, and after 6 months they can apply for occupying this job.

The social impact which the approval of the project would have, estimated a growth in the capacity to administrate human resources by each authority and public institution and a growth in the quality of services offered to citizens by the public administration3.

The draft law for modifying and completing Law 188/1999 regarding the status of public servants was adopted by the Chamber of Deputies. Afterwards, the act was submitted to the Secretary General, so as to exert the right to take notes about the constitutionality of the law, being furthermore sent to the President of Romania for approval.

The novelty brought by amending the law in relation to the two mentioned ordinances is that the function of leader of public decentralized services returns to the status of public function, thus the function of coordinating director being eliminated, with the status of contracted staff.

Bearing in mind the problems raised by the provisions of the laws before, neither does the new law support an adequate legal framework. Therefore, the executive director's function and the deputy's function will be replaced, and a new function will enter into force: that of director and deputy director of these services.

So, the contracted jobs created by means of the two ordinances in 2009 cannot return to their initial form – executive director and deputy executive – but are transformed into a new category - director and deputy director.

All these changes which were made lately with regards to the legislative system which regulates the status of the leaders of decentralized services question the legal treatment applied to these functions in the public administration. Moreover, under the conditions of an instability at the normative level, one may prejudice the purpose instituted by the legislator, by means of art 1, par. 2 in Law 188/1999, representing the creation of a "stable public service". The form submitted to approval was subjected to an objection of unconstitutionality, raised by a group of 33 senators, in this way requesting that the Court decide upon the constitutionality of dispositions art. 1, par. 1, 6 and 27, 28 respectively from the Law regarding the modification and supplementation of Law 188/1999, regarding the public servants' status.

[3] Reasons Exposed, With Regards to the Law for Modifying and Completing Rule no. 188/1999 with Respect to the Public Servants

The changes in the status of public servants were censored by the Court, the main criticisms bearing in mind the violation of provisions in art 16, par. 1 and 3, and in art 53.

The objections regarding the draft project were formulated in relation to the critical condition in the decentralized institutions, where at present time there are 2 even 3 persons which have the same leading position: persons nominated as per OUG 37/2009, staff accepted as per OUG 105/2009 and those who had the function of public servants prior to this executive function, renamed in function by means of a judicial decision. The leaders of decentralized public services were dismissed by means of various legislative modifications, this leading to the inequality of treatment, and to the cancellation of the access to public function and to the stability of work relations.

At the same time, due to the opinion of the critics, the new law for modifying the status of public servants is an abuse on behalf of the initiator, which in fact expands the way in which the quality of public servant is acquired. Thus we aim at finding a solution for the persons nominated as per political criteria in leadership positions, and who have to acquire the quality of public servant as per art. 56 in the Law.

Moreover, we estimated that "the forced modification, within short periods of time, of norms that regulate the legislative regime for the decentralized public services leaders, in case of Ministries and other institutions in the public administration is bound to affect the status of public servants in the decentralized public services and cannot provide for the equality of this category of public servants in relation to the other persons that occupy or occupied public functions in public, local, or central administration".

Although a new fictional category of public functions will be created – director and deputy director of public services, in fact these are identical in what concerns the attributions and competences with the functions of executive director and deputy director of decentralized public services which existed prior to the two. Thus, the regulations of art. 1, par. 1 and 28 have as single reason the impossibility to reintegrate the persons which occupied the latter functions.

With regards to the art. 1, par. 6 in the modifying Law, the legal text established the organization of the recruitment exam for the public servants, as follows: "In art. 58, paragraphs 1 and 3 are modified, having the following content : (1) The admission contest for the public functions in the public, central and local institutions, independent authorities, and in the decentralized public services for the Ministry and the other institutions in the public administration sector in the administrative-territorial units is organized as follows : a) by the commission provided by article 18, par. 1, for the public servants with the highest rank. The technical secretary of the commission is provided by the National Agency for

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Public Servants; b) by the NAPS, for occupying the public functions, generally and at the administrative-territorial level, except for the public leading functions of secretary for the village, chief-in-service and head of office; c) by public authorities and institutions in whose nomenclature we find public function, for the leadership public functions of village secretary, chief-in-service or head of office, and for the specific public functions assimilated to the above, as well as for all public functions uncovered or temporarily uncovered. […] (3) In case of admission contests provided in art (1) –c), the authorities and public institutions have the obligation to let the NAPS know about the organization of contests, 10 days prior to starting the procedures provided by law>>";

In view of recruiting new public servants, it was estimated that the objectivity in verifying the competences and skills for the candidates is altered, this leading to discrimination, because the recruitment in the leadership functions of chief-in-service or head of office cannot be performed by the NAPS but by the authorities in the public institutions whose nomenclature covers the named public functions.

In view of art. 1, par. 27 the access to public function cannot be facilitated by admission contest, but by transforming the jobs by contract in public functions. As per these regulations which modify the art. 111 from Law 188/1999, it is provided that "(1) The authorities and public institutions which have in the nomenclature contractual positions, which involve exerting attributions provided in art.2, par. (3) have the obligation to establish public functions under the conditions of art. 107, 30 days after the existence of these attributions was noted. (2) The vacant public functions, the leading functions and the functions corresponding to the servants with the highest rank, as per par. (1), are occupied under the conditions of the present law. (3) The persons covering contractual functions which were established and approved as public functions will be nominated in executive public functions if they fall under the conditions provided in art.54, and if they meet the age in special studies, as per the professional degree and class of public function. (4) The right to payment for persons which occupy public functions under the conditions of art.(3) are established according to the legal paid amount for the public functions they have".

When considering these provisions, the persons covering contractual positions, which fall under art.1, par.27 of the Law, are bound to occupy public functions as per an administrative act of nomination, in absence of an admission contest, which is discriminatory in relation to persons which want to accede to a public function, in which situation the access to this function is performed only by means of a contest.

With regards to the objection of unconstitutionality, the President of Senate supported the criticisms formulated, showing that the continuous modification of the juridical regime applicable to the

decentralized public services' leaders, as well as the successive change in the nomenclature of functions affects both their stability and their juridical status, which violates the right to accede to a public function and the principle of stability which should stand the grounds of the exerting of public functions". Furthermore, the point of view formulated was expressed with regards to the fact that the Law provides a discriminatory regime among the public services' leaders and the other public servants, by creating a new category of public functions and leading to the impossibility of reintegrating persons which occupied these public functions4.

The position of the Government was expressed with regards to the lack of basis of the criticisms formulated, showing that the modification in the terminology used in relation to the names given to the executive functions in the decentralized public services doesn't affect their juridical regime. Also, the provisions of art.1, par. 1 from the Law doesn't violate the provisions of art. 16, par. 1 and 3 in the Constitution, the criticisms formulated being simply "subjective findings, without any basis" 5.

At the same time, according to the argued reasons for the draft project, both the legal writing mentioned above and paragraphs 6,27, and 28 don't take into account the real problems of unconstitutionality, being an expression of the continuity of the decentralization of the public functions' account and of the public servants.

Bearing in mind the arguments brought to light in what concerns the constitutionality criticism of the provisions discussed, due to Decision 414 from 14.04.2010, published in Monitorul Oficial 291/4/05/2010, the Court stated that the provisions in the Rule for modifying and completing the Public Servant's Status, namely art 1. par. 1, which modify art. 13, par. 1, letter d), art. 1, par. 6 for modifying art 58, par. 1 and 3, art 1, par. 27 which replace the current provisions for art. 111, as well as art.1, par. 28 which modifies the addendum, chpt. 1, letter B par. 4 and 5 from the Law 188/1999 are unconstitutional.

When motivating its decision, the Court stated that there is a discrimination towards persons who have leading positions at the level of public services, and those who have these kinds of jobs at the level of prefect's office, of the local public administration's authorities and of the public institutions subordinated

[4] The point of view of the President of Senate formulated by act 663/10.03.2010, with regards to the objection of unconstitutionality of dispositions in art. 1, par.1, art 1, par.6, art. 1, par 27 and art 1, par 28 from the Law for modifying and supplementing Law 188/1999 with regards to the public servants' statuses
[5] The point of view of the Romanian Government formulated by letter 5/1645/E.B., 12/03/2011, with regards to the objection of unconstitutionality of dispositions in art. 1, par.1, art 1, par.6, art. 1, par 27 and art 1, par 28 from the Law for modifying and supplementing Law 188/1999 with regards to the public servants statuses

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to them, abolishing at the same time the principle of accessing public function and that of stability of job relations.

Thus, claiming a different legal status regarding persons that currently have the functions of director and deputy director respectively - at the level of public services, as related to executive directors or deputy executives in the institutions mentioned above, will lead to violating art. 16 , par. 1 in the Constitution. Moreover, the act that states fulfillment of justice will be affected as it wouldn't have juridical effects anymore, and furthermore the right to defense provided by art. 24 in the Fundamental Law will be affected, because the potential measures taken by Courts in case of the positions of executive director or deputy director not be performed under the new law's conditions, since the position is nonexistent, and the new position be occupied under legal conditions, as per admission contest.

Moreover, the Court stated that the initiator of the Law doesn't have the power to cancel and create again new functions as per legal documents, the more so as there aren't any valid arguments in support of these measures. Moreover, due to the lack of intention to reorganize decentralized public services, it isn't justified to dissolve the positions of executive director and deputy executive.

The Court notes that "one of the principles which stand up-front to the right to work is the establishment of juridical relations which appear along with signing the individual working contract, this principle deriving from the States' obligation to create the legal framework bound to guarantee work safety and retention".

Another unconstitutionality argument is related to the essential elements of the right to access a public function and to the actual access.

But delivery of service should be regulated uniformly, so as to avoid discriminations which can arise from the existence of different ways to access public functions. The Court notes that there must be a unity of legal treatment with regard to the conditions to access public functions in case of leading or executive positions. Thus there is a need to impose a regulation in this respect, and exceptions to the general procedure must be justified in an objective, rational, good and reasonable manner (Decision 414/2010).

5. CONCLUSIONS

Under the conditions when a public administration requires the development of a body of civil servants which must be professional, stable and impartial, exerting public service, and contributing to making efficient the public administration, corresponding to the European requirements, we state that political

interference in administration can not lead the administrative reform in Romania in an optimal direction. The lack of constitutional basis in what concerns previous normative acts has as consequence the rightful cease of the effects of the subsequent acts which were issued based on the above mentioned acts, namely the cease of management contracts or administrative acts given in support for the two emergency ordinances. In which case, as per the Court's jurisprudence, referring to Decision 62 from 18th January 2007, published in Monitorul Oficial of Romania, part 1, no. 104 from 12 February 2007, in case of the unconstitutionality of repealed acts – namely the two ordinances mentioned, "these cease their legal effects under the conditions claimed by article 147, par. 1 from the Constitution, and the legal provisions which constitute the subject for the abrogation continue to cause effects".

Although on the 28th February 2010, as per current regulations, the status of the public servant effects in the form prior to the changes caused by the two ordinances commented upon, these norms having consequences on decentralized public services, where managers do their job as per the provisions in the Governmental Emergency Ordinance 105/2009, contrary to the decisions stated by the Court.

As a consequence, as per law, the executive director and the deputy executive should have been replaced as per the Government Emergency ordinance no. 37/2009. In spite of all, when lacking a legal decision made by the administrative court, the only person in charge for the Institution is the coordinating director named on the basis of OUG 105/2009, which director doesn't exercise its attributions given by law, all acts signed by the herein director being null. With respect to this situation, the Court of Auditors was called to evaluate the unjustified expenses generated by the instability created at the level of decentralization, bearing in mind the aspect according to which management contracts written on the basis of OUG 37/2009 and OUG 105/2009 are now outdated. In this matter, payment orders of wages for these persons are executed abusively, and without any legal basis.

Thus, there is a necessity to analyze financial losses, having in view the situations when the same management position is occupied by two, even three directors, as related to the economic situation of the country. Moreover, besides this, there is important loss at the level of public budget, due to the fact that some of the directors fired abusively as per the two unconstitutional ordinances were given the rights to be paid for the whole period of dismissal.

The expert analysts anticipated that even after this the situation in Romania won't be any better, the main contributors to the impossibility to better the economy being the lack of trust in the economic policies of the Government and the lack of funds. The consequence of the instability of the legal framework regarding public function are worse as time passes, contributing to Romania's impossibility

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to recover. After stating that the two ordinances are unconstitutional, modifying the status of public servants, there was a necessity to initiate a project which responds to the observations of Court with respect to the discussed matter, thus regulating the unconstitutional provisions and putting them in agreement with the fundamental Law. Although a 45-day period was established, when unconstitutional aspects were suspended by law, the Rule for modifying the Status of public servants couldn't be agreed upon. As consequence, in our opinion the situation of the persons with management positions at the level of decentralized institutions is uncertain, bearing in mind that there aren't many cases when management takes into account OUG 105/2009 as being unconstitutional. Moreover, in certain situations the directors claim that they have the right to sign contracts as long as they agreed on valid management contracts, until another law that doesn't have any effects on these agreements comes into force.

In this respect there is a need to issue annulment orders regarding decisions through which the chiefs of decentralized institutions were named coordinating directors and were also dismissed on the basis of the two unconstitutional ordinances. So, although there were discharged from the status of public servants, some directors must apply for admission contests in order to reclaim this position.

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The point of view of the President of Senate, formulated though the letter 662/10/03/2010, with regards to the objection of unconstitutionality in dispositions art 1, par. 1, art. 1, par.6, art. 1, par. 27 and 28 respectively, from the Law for Modifying and Completing Rule no. 188/1999 regarding the Status of Public Servants.

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